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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF STATE OF WASHINGTON

LOUISE LAUER and DARRELL
deTIENNE,

Respondents.

v.

PIERCE COUNTY; MIKE and SHIMA
GARRISON and BETTY GARRISON,

Appellants.

NO. 38321-7-II

JOINT STATEMENT RE:
ASSIGNMENTS OF ERROR AND
ISSUES

Pursuant to this Court's Order on Motion for Relief and Directing Further Action, the parties submit the following joint statement regarding the assignments of error and issues presented in this appeal.

I. Decisions Addressed On Appeal.

On December 13, 2007, the Pierce County Hearing Examiner issued a Report and Decision approving a Fish & Wildlife Variance for property owned by appellants Garrison. (CP 13-26.) In the Report and Decision, the Examiner concluded that a building permit application submitted by the Garrisons in 2004 created vested rights such that the Fish & Wildlife Variance should be evaluated under the zoning regulations in place in 2004 rather than the applicable regulations in

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place at the time the variance application was submitted. On March 4, 2008 the Examiner issued a Decision on Reconsideration through which he affirmed his prior decision regarding the vested rights associated with the Garrison's building permit application. (CP 29-32.)

Respondents Lauer and deTienne filed a Land Use Petition Act (LUPA) appeal pursuant to chapter 36.70C RCW challenging the Examiner's findings and conclusions regarding the vested status of the Garrisons' building permit, thus seeking reversal of the variance approval. (CP 1-34.) Prior to the hearing on the merits of the LUPA appeal, appellants moved to dismiss the appeal on the basis that respondents failed to demonstrate standing. The Superior Court denied the motion to dismiss. (CP 502-504.) Following the hearing on the merits, the Superior Court reversed the Examiner's decision to approve the variance based upon former Pierce County regulations, holding that the building permit application did not afford the Garrisons vested rights with regard to the requested Fish & Wildlife Variance. (CP 505-513.) Appellants thereafter moved for reconsideration based upon the decision *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242 (2008), which decision was issued by the Supreme Court after the hearing on the merits. The Superior Court denied the motion for reconsideration. (CP 514-15.)

Appellants Garrison appealed all three of the above decisions by the Superior Court seeking reinstatement of the Examiner's decision. (CP 500-15.) While this appeal was pending, this Court issued the decision of *Mellish v. Frog Mountain Pet Care*, ____ Wn. App. ____ 225, P.3d 439 (2010). Based upon the *Mellish* decision, appellants also assert that this Court lacks jurisdiction to hear the LUPA appeal and, thus, the Examiner's decision approving the variance should be reinstated.

All of the above decisions are addressed in this appeal. Pursuant to LUPA, respondents Lauer and deTienne bear the burden of proof on all challenges to the validity of the Examiner's Report and Decision and subsequent Decision on Reconsideration. This Court reviews the Examiner's decisions and the record created by the Examiner, directly applying the standards of review set forth in LUPA RCW 36.70C.130. The burden is on appellants Garrison with regard to challenges to the Superior Court's decision on standing, the application of *Futurewise, supra*, to this LUPA appeal and the application of *Mellish* to this LUPA appeal.

II. Assignments Of Error To Decisions On Appeal.

A. Respondents Lauer and deTienne's assignments of error to the Hearing Examiner's decision.

Pursuant to RCW 36.70C.070(7) and (8), respondents Lauer and deTienne assign error to all findings and conclusions in the Examiner's Decision (CP 13-26) that support the Examiner's conclusion that the Garrisons' Fish & Wildlife Variance application vested under the laws in effect at the time the building permit issued. More specifically, respondents assign error to Findings 7, 8, 9, and 11 of the December 13, 2007 Report and Decision. Respondents also assign error to Finding 11 and Conclusion 2 of the Report and Decision to the extent that they constitute a finding that the pre-March 1, 2005 critical areas development regulations do not and should not be applied to the subject application. Respondents also assign error to all Findings and Conclusions set forth in the March 4, Decision on Reconsideration (CP 29-32) affirming the Examiner's prior decision on the issue of vesting. The Findings and Conclusions to which error is assigned are unsupported by the substantial evidence and are contrary to law. The Examiner's errors are as follows:

1. The Examiner's decision that the Garrisons' 2004 building permit application was a valid and complete application is not supported by the substantial evidence and is contrary to the law. The application was not complete in that it contained incomplete and false information regarding the

existence of a DNR Type Watercourse and purported structures in close proximity to the DNR Type Water Course. The application failed to disclose that a DNR Type Watercourse existed on the premises and that the proposed structure would be constructed within the regulatory buffer.

2. The Examiner's decision that the Garrisons' 2004 building permit application was a valid and complete application is not supported by the substantial evidence and is contrary to the law. The application was not complete because it proposed development within a requisite stream buffer, and thus was inconsistent with the applicable regulations, but did not include an application for a Fish & Wildlife Variance application to seek permission to build within the buffer.
3. The Examiner's decision that the Garrisons' 2004 building permit application was a valid and complete application is not supported by the substantial evidence and is contrary to the law. The Examiner failed to consider that a prior Hearing Examiner determined that the construction activities conducted pursuant to the building permit application were inconsistent with applicable Pierce County regulations.
4. The Examiner's decision that there were no major revisions to the Garrisons' building permit application is not supported by the substantial evidence and contrary to law. The necessary revision to accurately depict the existence of a DNR Type Watercourse, the lack of an "existing drive" and the request for a variance constitute a major revision to the original application.

Respondents Lauer and deTienne hold the burden of proof under the standards of review set forth in RCW 36.70C.130 for the above stated assignments of error of the Examiner's decisions.

B. Appellants Garrisons' assignments of error to the Superior Court's decision.

Appellants Garrisons assign errors to each of the decisions of the Pierce County Superior Court. The errors are as follows:

1. The Superior Court erred when it denied appellants motion to strike certain assertion made by respondents that were not supported by the record.
2. The Superior Court erred in finding that respondents had standing under RCW 36.70C.060(2).
3. The Superior Court erred in finding that the respondents sustained their burden under RCW 36.70C.130(1) of establishing that appellants' application was incomplete.
4. The Superior Court erred in finding that respondents sustained their burden under RCW 36.70C.130(1) of establishing that appellants' application was not vested as a matter of law under RCW 36.70B.070(4).
5. The Superior Court erred in finding that the respondents sustained their burden under RCW 36.70C.130(1) of establishing that the Hearing Examiner's finding that appellants did not have "unclean hands" was erroneous.
6. The Superior Court erred in finding that the respondents were not equitably estopped from alleging that appellants' application was not vested.
7. The Superior Court erred in finding that respondents appeal was rendered moot by the Supreme Court decision in *Futurewise v. Western Washington Growth Management Hearings Board, supra*.

Appellants Garrison carry the burden of proof on assignments of error 1, 2, 6 and 7; respondents Lauer and deTienne carry the burden of proof on assignments 3-5.

III. Issues Based On Assignments Of Error To Decisions On Appeal.

A. Issues Related To Challenges To The Hearing Examiner Decision.

1. Whether Hearing Examiner erred in his determination that appellants' variance application had vested based on respondents challenge that the substantial evidence in the record establishes that the application was both incomplete and contained false information? (RCW 36.70C.130(1)(c).)
2. Whether the Hearing Examiner erred in his determination that appellants' variance application had vested based on respondents challenge that the Examiner's decision is an erroneous interpretation of the law and that the decision is a clearly erroneous application of the law to the facts? (RCW 36.70C.130(1)(b) and (d).)
3. Whether Hearing Examiner erred in finding that appellants did not have "unclean hands?" RCW 36.70C.130(1)(b)-(d).)

B. Issues Related To Challenges To The Superior Court Decisions.

1. Whether the Superior Court erred in refusing to strike claims regarding standing alleged by respondents in paragraph 8 of their LUPA petition when the facts asserted were not supported by the record.
2. Whether the Superior Court erred in finding that respondents met their burden of establishing each of the elements of standing pursuant to RCW 36.70C.060(2).
3. Whether the Superior Court erred in finding that respondents were not equitably estopped from alleging that appellants' application since respondents did not intervene in a prior land-use dispute between the County and appellants which resulted in a settlement agreement.
4. Whether the Superior Court erred in finding that respondents' LUPA appeal was not moot under the Supreme Court's decision in *Futurewise v. Western Washington*

Growth Management Hearings Board, 164 Wn.2d 242 (2008).

C. Issues Related To This Court's Decision In *Mellish*.

1. Whether the *Mellish v. Frog Mountain Pet Care*, No. 37583-4-II (2/3/2010) decision is dispositive of this appeal because respondents' LUPA petition was filed 105 days after the Examiner's December 13, 2007 Report and Decision and the superior court therefore lacked jurisdiction.
2. Whether appellants are barred from raising *Mellish*, in this case, since the issue was not raised at the LUPA Initial Hearing as required by RCW 36.070C.080.
3. If *Mellish* applies, whether the case should be remanded to the Superior Court to determine if equitable tolling applies.

IV. Relief Sought.

Appellants Garrison seek reversal of the Superior Court decision and reinstatement of the Hearing Examiner's decisions approving the Fish & Wildlife Variance. Respondents Lauer and deTienne request this Court to affirm the decision of the Superior Court, which reversed the Hearing Examiner's approval of the Fish & Wildlife Variance.

V. Burden Of Proof For Each Issue And Relevant Briefing.

Respondents Lauer and deTienne bear the burden on the issues presented in section III(A) above pursuant to the standards of review set forth in RCW 36.70C.130.. Appellants Garrison bear the burden on the issues set forth in sections III(B) and (C) above.

The issues regarding *Mellish* set forth in section III(C) above are briefed exclusively in Appellants Supplemental Brief – Regarding *Mellish v. Frog Mountain Pet Care, Et Al* dated February 1, 2010 and Respondents Supplemental Brief – Regarding *Mellish v. Frog Mountain Pet Care, Et Al*, dated February 22, 2010.

All of the issues set forth in sections III(A) and (B) were addressed in the Appellants' Opening Brief dated September 9, 2009, Respondents' Brief dated November 3, 2009 and Appellants' Reply Brief dated December 8, 2009. The specific pages on which each issue is addressed in the briefs are as follows:

A. Issues Related To Challenges To The Hearing Examiner Decision.

1. Whether Hearing Examiner erred in his determination that appellants' variance application had vested based on respondents challenge that the substantial evidence in the record establishes that the application was both incomplete and contained false information? (RCW 36.70C.130(1)(c).)

Appellants' Opening Brief pages 27-37

Respondents' Brief pages 21-34

Appellants' Reply Brief pages 15-17

2. Whether the Hearing Examiner erred in his determination that appellants' variance application had vested based on respondents challenge that the Examiner's decision is an erroneous interpretation of the law and that the decision is a clearly erroneous application of the law to the facts? (RCW 36.70C.130(1)(b) and (d).

Appellants' Opening Brief pages 23-39

Respondents' Brief pages 21-34

Appellants' Reply Brief pages 14-18

3. Whether Hearing Examiner erred in finding that appellants did not have "unclean hands?" RCW 36.70C.130(1)(b)-(d).)

Appellants' Opening Brief pages 39-41

Respondents' Brief pages 33-39

Appellants' Reply Brief pages 19-20

B. Issues Related To Challenges To The Superior Court Decisions.

1. Whether the Superior Court erred in refusing to strike claims regarding standing alleged by respondents in paragraph 8 of their LUPA petition when the facts asserted were not supported by the record.

Appellants' Opening Brief pages 14-16

Respondents' Brief pages 14-16

Appellants' Reply Brief pages 6-8

2. Whether the Superior Court erred in finding that respondents met their burden of establishing each of the elements of standing pursuant to RCW 36.70C.060(2).

Appellants' Opening Brief pages 16-23

Respondents' Brief pages 16-21

Appellants' Reply Brief pages 8-13

3. Whether the Superior Court erred in finding that respondents were not equitably estopped from alleging that appellants' application since respondents did not intervene

in a prior land-use dispute between the County and appellants which resulted in a settlement agreement.

Appellants' Opening Brief pages 41-43

Respondents' Brief pages 39-42

Appellants' Reply Brief pages N/A

4. Whether the Superior Court erred in finding that respondents' LUPA appeal was not moot under the Supreme Court's decision in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242 (2008).

Appellants' Opening Brief pages 43-49

Respondents' Brief pages 42-50

Appellants' Reply Brief pages 20-25

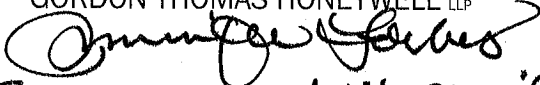
VI. Additional Briefing.

The undersigned all agree that additional briefing is not required.

Dated this 30th day of March, 2010.

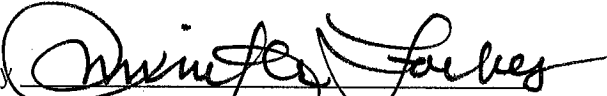
Respectfully submitted,

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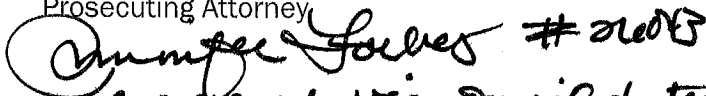
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